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Livewire Services, Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

PERFECT 10, INC., a California corporation,  
  
Plaintiff,  
  
vs.  
  
GIGANEWS, INC., a Texas corporation;  
LIVEWIRE SERVICES, INC., a Nevada  
corporation; and DOES 1 through 100, inclusive,  
  
Defendants.

Case No. 11-CV-0905 H (MDD)

**DECLARATION OF THOMAS J.  
KEARNEY IN SUPPORT OF  
DEFENDANTS' RULE 12(b)(6)  
MOTION TO DISMISS**

**DATE: August 15, 2011  
TIME: 10:30 a.m.  
Hon. Marilyn L. Huff  
COURTROOM 13 – Fifth Floor**

I, Thomas J. Kearney, declare as follows:

1. I am a member in good standing of the State Bar of California and the bar of this Court. I am an associate with Winston & Strawn LLP, attorneys for Defendants Giganews, Inc. and Livewire Services, Inc. in the above-entitled action. I have personal knowledge of the facts set forth herein, except where noted, and, if called to testify, could and would competently testify thereto.

2. Attached as Exhibit A is a true and correct copy of Giganews's Terms of Service, as stated on its website at <http://www.giganews.com/legal/aup.html>. I accessed this page, which bears the title "Giganews Acceptable Use Policy," on June 22, 2011 by visiting Giganews's home page at <http://www.giganews.com/> and selecting the "Terms of Service" hyperlink.

3. Attached as Exhibit B is a true and correct copy of Giganews's DMCA policy as stated on its website at <http://www.giganews.com/legal/dmca.html>. I accessed this page on June 22, 2011 by visiting Giganews's home page at <http://www.giganews.com/> and selecting the "DMCA"

1 hyperlink.

2 4. I have reviewed a true and correct copy of the disk referred to in the Declaration of  
3 Ronald Yokubaitis in support of the instant motion (filed concurrently herewith) at ¶ 2, Exhibit B.  
4 The disk contains more than 1,400 images of naked and scantily clad women, none of which  
5 appeared to be duplicates. None of the images contained any discernable copyright registration  
6 numbers.

7 5. Perfect 10 alleges in its Complaint that the disk referred to in the above paragraph  
8 contained "approximately 800 Perfect 10 copyrighted images." Compl. ¶ 31. By necessary  
9 implication, the rest of the more than 1,400 images on the disk—or more than 600 images—were *not*  
10 Perfect 10 copyrighted images. This means that more than 40% of the images were *not* Perfect 10's.

11 I declare under penalty of perjury that the foregoing is true and correct to the best of my  
12 knowledge.

13 Executed this 22nd day of June, 2011, in San Francisco, California.

14 By   
15 THOMAS J. KEARNEY

### **Table of Exhibits**

<b>Exhibit</b>	<b>Description</b>	<b>Page</b>
A	Giganews.com Terms of Service ("Acceptable Use Policy")	4
B	Giganews.com DMCA Policy	8

# **EXHIBIT A**





## Giganews Acceptable Use Policy

The Giganews Acceptable Use Policy outlines acceptable usage of your Giganews account, describes what we consider to be abuse of our services, and details the procedures we follow in investigating reports of abuse.

Although we wish to extend every possible consideration to our members, Giganews will deal quickly and decisively with instances of clear abuse of our service, to include suspension of posting or account termination.

By signing up and/or using your Giganews account, you agree to abide by this policy and to keep updated on changes, since this policy may change at any time. This Acceptable Use Policy should be considered as part of the [Terms of Service](#) for your Giganews account.

## Reasonable Use Policy

Giganews would like for all of its members to have reasonable use of its service. To that end, Giganews may curtail unreasonable usage of Unlimited accounts in order to ensure the best possible service for all members. Giganews' Unlimited account does not constitute a dedicated connection. If a member appears to be unable to maintain a reasonable use of the service, Giganews may cancel, suspend, or decline to renew service for that member without notice. It is within Giganews' sole discretion to determine what comprises unreasonable use.

Giganews accounts are for individual use only. Any non-individual use, or any use that is indistinguishable from non-individual use, is prohibited. For example, the following uses are prohibited:

- Sharing a login between people
- Simultaneous logins from multiple IP addresses
- Connecting from a proxy of any kind
- Using DNEWS, NetCache, or any other multi-access caching system

## Net Etiquette and Abuse

Each newsgroup can be considered as a separate "community", where those who regularly use the newsgroup have standards for what is appropriate and what is not. These standards can vary from one group to the next. Many groups have written charters and FAQs that reflect a consensus of those who regularly use the newsgroup. You should always read posts in a newsgroup to learn what is considered appropriate before posting to that newsgroup. For a listing of charters and FAQs on various subjects, be sure to check out [www.usenetfaaguides.com](http://www.usenetfaaguides.com).

At Giganews, we would like every member to have the best experience possible with the newsgroups. We do not, however, wish that to be at the expense of others. The newsgroups are comprised of people from diverse backgrounds. When communicating with people on the newsgroups, it is best to keep in mind that there are many other people that read what you post. Please consider the views and feelings of everyone who might read your posts and give them the same consideration and respect as you would like to receive yourself.

## Posting

When Giganews receives complaints of improper or abusive posting from our servers, we consider the following guidelines as we investigate the posting. Improper or abusive posting may result in temporary or permanent suspension of posting on the account, or in account termination.

## Copyrights

Almost every country has copyright laws. Giganews cannot and does not review the information flowing through or stored on our system. When you become a Giganews member, you are agreeing not to transfer or store copyrighted works on our system without the permission of the copyright holder.

## Spam

Although there is no single, precise definition of spam, and there are differing opinions on what constitutes spam, we will consider the following when reviewing complaints:

- **Repetitive Posting**  
Posting the same thing repeatedly in one or more newsgroups will usually be considered spam, regardless of the content.
- **Commercial Posts**  
Commercial posts are frowned upon in nearly every newsgroup. Most groups do not welcome contributions from a

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Unlimited Usenet + SSL (~17,38€)  
20 Connections

**SILVER** \$14.99  
50GB Usenet + SSL (~10,43€)  
20 Connections

Other Usenet plans starting at \$4.99 »

## What People are Saying

*I have been a member of giganews for around 5 years now. Hands down the best service out of the 5-6 of major players I have tried.*

**Kevin - Coon Rapids, Minnesota**

[View more testimonials »](#)

## Recent Blog Posts

- May 26 Golden Frog releases Mimo Beta v0.2.2 for Diamond Members
- May 19 New VyprVPN UK Server Now Available!
- May 11 Please Read Our Members' Testimonials



business or commercial website.

- **Promotional Posts**

Promoting a business, a website, or an organization will usually be considered as spam, in nearly every newsgroup. This can even include inviting visitors to a 'personal', 'public service', or charitable website.

- **'For Sale' Groups**

Most groups with 'forsale' in the group name are meant for individuals to exchange information about items they are selling or wish to purchase. Many of these groups are 'local' to a geographical area. Most of these groups do not welcome posts from businesses or about items for sale on an auction site, such as eBay. Be certain that your posts to these groups will be welcomed by those who use these newsgroups.

- **Chain Letters/Pyramid Schemes**

According to United States law, chain letters and pyramid schemes are illegal. Almost all "make money fast", "get rich quick", and "multilevel marketing" offers fall into this category. If you are found to be posting these to the newsgroups, your account will be terminated.

- **Crossposting**

A few binary newsgroups, such as certain music groups, encourage posting to more than one group at the same time, as long as the content is appropriate to each newsgroup. The majority of binary groups and almost all text groups, however, discourage any form of crossposting. Please consider that a thread in a text group may begin as appropriate to two newsgroups, but followups may soon become "off topic" in one of the groups.

- **Off-Topic Posting**

Nearly every newsgroup has a stated topic or acceptable range of topics for posting or discussion. Blatant disregard of the intended subject matter in a newsgroup will be treated as abusive posting. Posting off topic material in large volume or with apparent malicious intent will lead to immediate account termination.

- **Trolling**

Trolling is the practice of maliciously trying to incite others that use a newsgroup, to deviate from the stated topic of the group. In other words, trolling is an attempt to anger others to the point of drawing them into an argument or an off topic debate. Giganews does not tolerate trolling and will terminate service of those who abuse the service in this manner.

- **Altered Headers**

Falsifying header lines to obscure the originating server, to attribute a post to someone else, to falsely indicate moderator approval, or to make an original post look like a followup are serious abuses of our service and will result in immediate account termination.

- **Other Abuse Situations**

The Giganews abuse staff has a great deal of experience with newsgroups, as individual users, ourselves. That extensive experience will allow us to reach an equitable determination in situations that do not fall into any of the explicit categories detailed above.

Giganews is very strict about spamming. You agree to not spam, and you agree to avoid any form of posting that may look like spam. **If it is determined that you have posted spam through the Giganews servers, you will be charged a \$50 cleanup fee per spam message that you posted, and your account will be terminated.**

## Retention and Completion

Giganews does not guarantee any retention or completion rates. Retention and completion rates displayed on Giganews' website are approximations based on then current data. As the posting volume on Usenet increases and decreases Giganews' retention may increase and decrease accordingly without notice.

## Abuse Reports

Reports of abuse can be sent to [abuse@giganews.com](mailto:abuse@giganews.com)

**We cannot address incidents of spam or other abuse unless it was posted through the Giganews servers. We will need full article headers in order to investigate any report of abuse originating on our servers.**

When we receive a valid abuse report about a Giganews member, our staff will take **immediate action**, as we feel necessary to ensure posting of the abusive material will cease. This may include **suspension of posting** on the account where the posts originated, pending investigation of the report.

If it is clear to our staff that someone has signed up for Giganews service for the sole purpose of abusing our service, the account will be terminated immediately without notice or refund.

Other complaints will be reviewed by our abuse staff. Each member of our abuse staff will consider the circumstances of the posting, the newsgroup to which it was posted, and the number of complaints received about the posting. In certain cases, we may consider whether there was a malicious intent apparent in the abusive posting. In addition to other factors, our staff will evaluate whether the subject posting is consistent with the kind of service we have chosen to offer to consumers. Our abuse staff almost always operates on a consensus basis.

Giganews wishes to offer a flexible service that will meet the needs of our members. We do not wish to regulate or censor our members in any way. We do feel an obligation, however, to encourage appropriate use of our service and proper use of the

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- Speed & Traceroute
- VyprVPN
- Mimo
- Giganews Accelerator
- Blog
- Peering
- Refer a Friend
- News

Support

- FAQ
- Usenet University
- Billing Support
- Technical Support
- Signup Issues

Languages

- English
- Français
- Português
- 体中
- Deutsch
- Español
- 日本語
- Nederlands
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## **EXHIBIT B**





## The Digital Millennium Copyright Act (DMCA)

The DMCA (Digital Millennium Copyright Act) was passed by the U.S. Congress in 1998 to deal with copyright infringement by electronic means, particularly over the Internet.

### Giganews and the DMCA

From the inception of the DMCA, Giganews has taken and continues to take the DMCA seriously. Giganews registered with the U.S. Copyright Office in 1998 as required by law, and continues to keep the registration information current. You can find our registered DMCA agent by browsing the [Directory of Service Provider Agents](#) or by going directly to [Giganews' registration PDF](#).

Below you will find guidance for drafting and submitting a notification to Giganews which will help ensure that your Notice is handled as promptly as possible. The information we share below has been honed through years of experience in working DMCA Notices. It doesn't matter whether you are a big corporation with tons of copyrighted materials or the little guy with a single copyrighted work, your copyright is important to us, and we will do what is required to protect your copyrights under the DMCA.

### Who can submit a DMCA Notice?

The DMCA only allows the copyright holder or a legally authorized agent of the copyright holder to legally submit DMCA Notices. If you are neither the copyright holder, nor the authorized agent thereof, and you have information on what you believe to be a copyrighted work found on our service, please direct your findings to the copyright holder. Legally, under the DMCA, only the copyright holder can identify their property and affirm under the penalty of perjury that it should be taken down.

### What information do we need in a DMCA Notice?

A properly formatted DMCA Notice will adhere to the guidelines and principals established by the DMCA itself. The necessary elements of a properly formed DMCA Notice are:

1. Clear identification of the person or entity submitting the DMCA Notice.
2. Clearly stated relationship to the copyright holder (self or authorized agent).
3. Message-IDs for all articles the DMCA Notice is requesting Giganews take down. Please keep in mind some files are large enough to be posted across several Usenet articles; these are called multi-part posts. Be certain to identify by Message-ID all articles you want taken down.
4. Clear statement, under penalty of perjury, that the information in the notification is accurate and that you are copyright holder, or authorized to act on behalf of the copyright holder.
5. A "physical or electronic signature" of an authorized person to act on behalf of the owner. This is fulfilled by a name and a physical address that the authorized individual can be contacted should someone wish to contest your notification.
6. While not legally required by the DMCA, including "copyright violation" in the subject line of your email will flag your DMCA Notice and bypass spam categorization.
7. Submit the Notice to [dmca2008@giganews.com](mailto:dmca2008@giganews.com), the email address [we have registered](#) with the Copyright office pursuant to Section 512(c) of the Copyright Act.

Feel free to view this [sample of a well formed DMCA Notice](#), and use it as a template for generating your own DMCA Notice should the need arise.

### I'm a copyright holder, how do I protect my copyrighted works?

The Internet is a complex place. There are many protocols and applications other than the web, and new methods of sharing information are created all the time. It would be nearly impossible for all but the most technically savvy persons to keep up with the ways the Internet can be used for sharing information. We do not believe technological progress on the Internet is a bad thing; it is merely a reality of the Internet.

Because of the ever-changing environment, and the complexity of policing the Internet at large for copyrighted materials, new businesses have formed to do exactly this job in the digital world on behalf of copyright holders. These online copyright and brand protecting companies have developed systems to monitor the Internet-at-large, and they have a vested interest to remain current with new Internet technologies for their customers. To best protect yourselves from infringement on the Internet, we recommend copyright holders engage such a company.

### What will Giganews do with a proper Notice?

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**PLATINUM** \$24.99  
Unlimited Usenet + SSL (~17,38€)  
20 Connections

**SILVER** \$14.99  
50GB Usenet + SSL (~10,43€)  
20 Connections

Other Usenet plans starting at \$4.99 »

### What People are Saying

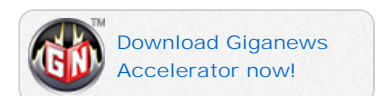
*To put simply, Giganews is the best value/feature-for-money usenet on the market today. You guys rock.*

Clément - Paris, France

[View more testimonials »](#)

### Recent Blog Posts

- May 26 Golden Frog releases Mimo Beta v0.2.2 for Diamond Members
- May 19 New VyprVPN UK Server Now Available!
- May 11 Please Read Our Members' Testimonials



Once we have proper identification of the infringing material through the Message-IDs and a well formed DMCA Notice, we will remove all identified infringing material forthwith. In the process of removing the material, we will analyze each article to determine if it was posted by a Giganews customer, and if it was so posted we will initiate our "Two Strikes and You're Out Policy" for that customer. Lastly, we will respond via email to your Notice informing you that we have deleted the materials you have identified.

What is Giganews' "Two Strikes and You're Out Policy"?

The DMCA requires that we maintain "a policy that provides for the termination in appropriate circumstances of subscribers and account holders of [our] system or network who are repeat infringers". Since the DMCA does not provide a definition for "repeat", Giganews has defined "repeat infringers" to be the minimum definition possible -- two incidents.

Upon receiving a valid DMCA Notice for infringing materials posted by a Giganews subscriber, we will email a copy of our ["One-time Notice of Copyright Infringement"](#) to that subscriber, and temporarily suspend the posting privileges of that subscriber. Posting privileges are not restored to a subscriber until we receive clear affirmation that future infringements will not occur. When a second DMCA Notice is received for an infringing article posted after the clear affirmation is received, we will, at the sole discretion of Giganews, terminate the account or place a ban on posting from the account.

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Legal	Giganews Accelerator	Technical Support	体中
DMCA	Blog	Signup Issues	Deutsch
Site Feedback	Peering		Español
Site Map	Refer a Friend		日本語
Affiliates	News		
Outsourcing			Nederlands
			繁體中

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